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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941.

No. 304

JOHANN CARL PFLUEGER,

*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA, ROBERT H. JACKSON, Attorney General of the United States, as Alien Property Custodian, and W. A. JULIAN, Treasurer of the United States.

## PETITIONER'S REPLY BRIEF.

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## PETITIONER'S REPLY BRIEF.

Respondents endeavor to distinguish *Becker Steel Company* v. *Cummings,* 296 U. S. 74, urging that it did not pass upon the question involved here. They brush aside the fact that this Court specifically left the question involved here open for determination in a case involving the precise point and ignore the language and reasoning of this Court which are contrary to the reasoning of the court below.

The *Becker Steel Company* case stands squarely for the proposition that the remedy afforded a citizen owner of property seized during the war must be adequate to secure to him the return of his property or compensation for it and that any attempted limitation on this would be of doubtful constitutionality. This is implicit in the other decisions of

this Court where the remedial provisions of the Trading with the Enemy Act were considered. (See *Henkels* v. *Sutherland,* 271 U. S. 298, 301; *Miller* v. *Robertson,* 266 U. S. 243, 248; *Stoehr* v. *Wallace,* 255 U. S. 239, 245; *Central Union Trust Company* v. *Garvan,* 254 U. S. 554, 566.) It is aptly summarized in the *Henkels* case, where this Court said (271 U. S. at p. 301):

> "With enemy owned property seized by the Custodian, it has been held the United States may deal as it sees fit, *White* v. *Mechanics Securities Corporation,* 269 U. S. 283; but it has no such latitude in respect of the property of an American citizen."

Respondents rely upon *Lynch* v. *United States,* 292 U. S. 571. The case has no bearing. While stating that the United States could be sued only with its consent, this Court construed a statute repealing all laws pertaining to war risk insurance to be aimed at the right rather than at the remedy, and held that consequently the suit might be maintained. Certainly the case is not an authority for the proposition that consent to be sued was not given an American citizen whose property was sold at less than its value under the Trading with the Enemy Act. Such consent was specifically provided in Section 9 of the Act and this Court has uniformly held that the remedy there provided must be adequate. (See cases cited above.)

The limitation, added by amendment adopted on November 4, 1918, that the quantum of recovery is limited to the proceeds of the sale or other disposition of the property did not purport to change Section 9, the remedial section of the act. The most that can be claimed for it is that it was an attempt by Congress to limit the right to compensation for such seized property to such sum as an administrative

officer of the government might receive for it. In other words, to let such officer determine the amount of compensation to be paid to the citizen. Such legislation clearly runs afoul of the Fifth Amendment and the decision in the *Becker Steel* case. The ascertainment of compensation for property taken by the government is a judicial function and cannot be determined even by Congress itself, let alone an administrative officer. *Monongahela Navigation Company* v. *United States,* 148 U. S. 312.

The decision of the court below and respondents' argument in support of it stand for the proposition that the property of a citizen may be seized and sold by an administrative officer of the government and the citizen owner limited to the proceeds of the sale, irrespective of adequacy. It would seem but a short step further, and implicit in the reasoning of counsel for the respondents and the court below, for the government to take the citizen's property and give him nothing for it. The legislation authorizing the seizure need only deny the owner access to the courts and the result will be confiscation.

We submit that this case presents a question of law that has not been passed upon by this Court, that the decision of the court below is contrary to the reasoning of this Court in the cases cited above and that this Court should review the case.

The respondents, as a second point to their brief, argue (pp. 6-8) that the petition should be denied because the petitioner is not entitled to any recovery on the facts adduced in support of respondents' motion for summary judgment because he was an "enemy." That motion was made before the district court in addition to respondents' motion to dismiss. It was not passed upon by that court or the

Court of Appeals. Respondents took no cross appeal and have not applied for certiorari.

The cases cited by respondents in their footnote (pp. 6-7) are not applicable since they deal only with the rule that an appellee or respondent may, without taking a cross appeal, urge *in support of the decree* any matter appearing in the record even though his argument may involve an attack on the reasoning of the lower court. But these cases expressly point out that an appellee may not attack the decree with a view either to enlarging his own rights or lessening the rights of his adversary.

The decree simply dismissed for lack of jurisdiction. What respondents seek is to enlarge the decree, in effect, have their summary motion granted and thus obtain a final judgment on the merits that the plaintiff was an "enemy" and so not entitled to just compensation. This they cannot do under the very authorities cited by them without themselves petitioning for certiorari.

In any event their contention is groundless because the facts show that shortly after the entry of the United States into the last World War the petitioner, an American citizen, sought to leave Germany, made application for an American passport on June 15, 1917 (Pflueger Ex. 2, R. 197) but did not receive it until a year later (R. 124) after his property in the Hawaiian Islands had been seized. Therefore, he was *in itinere* at the time of the seizure and the cases cited by respondents on page 7 of their brief in support of their contention that the petitioner was an "enemy" are not in point.

Furthermore, respondents overlook and fail to mention that prior to the sale of the petitioner's Hawaiian properties, he protested the seizure and sale and that protest

reached the Custodian before he had disposed of the properties (R. 214-5), but in complete disregard of it he disposed of the valuable properties instead of holding them for the petitioner.

It is, therefore, respectfully submitted that the petition for a writ of certiorari should be granted.

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